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Supreme Court of the United States

No. . October Term, 1936.

WILLIAM WHITLOCK BRUSH,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of William Whitlock Brush, petitioner-appellant below, respectfully shows:

I. Your petitioner, until lately the Chief Engineer of the Bureau of Water Supply of the City of New York, applied to the Court below for the review of the determination of the United States Board of Tax Appeals to the effect that his salary, paid for services rendered in that capacity in 1931, was subject to a federal income tax.

II. The petition to review the determination of the Board of Tax Appeals came on for hearing before the Circuit Court of Appeals for the Second Circuit on April 8, 1936, before MANTON, L. HAND and CHASE, Cir. JJ., and was argued by counsel; and on July 13, 1936, an opinion was handed down, per CHASE, Cir. J., sustaining the determination of the Board of Tax Appeals and declaring your peti-

tioner's salary as Chief Engineer to the Bureau of Water Supply of the City of New York subject to federal income taxes. The opinion is reported in 85 F. (2d) 32.

III. Your petitioner submits that the decision below is in conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in *Hoskins* v. *Commissioner of Internal Revenue,* 84 F. (2d) 627 (1936), and with the decision of the United States Court of Appeals for the District of Columbia in *Halsey* v. *Helvering,* 75 F. (2d) 234 (1934), and that the conflict should be resolved by this Court at this time.

IV. Your petitioner avers that the Second Circuit's decision in the instant case will result in confusion and uncertainty as to the municipal and State agencies which may be taxed by the federal government and, correspondingly, which federal agencies may, likewise, be taxed by the several States.

V. Your petitioner avers that the supply of pure water to the City of New York, in adequate amounts, is a "usual governmental function", and that the claim of the federal government, upheld by the Court below, that it may subject your petitioner's salary to federal income taxes, amounts to an unwarranted and dangerous extension of the doctrine of *Helvering* v. *Powers,* 293 U. S. 214 (1934), and is otherwise contrary to law.

WHEREFORE, for reasons stated more fully in the annexed brief, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the

record and all proceedings of the said Circuit Court of Appeals for the Second Circuit in this cause, being No. 246 on its calendar for the October Term, 1935, to the end that the case may be reviewed and determined in this Court, as provided in Title 28, § 347 of the Code of Laws of the United States, and that the said final decree of the said Circuit Court of Appeals for the Second Circuit in this cause, and every part thereof, may be reviewed by this Court, and the determination of the said Circuit Court of Appeals for the Second Circuit, as well as the determination of the United States Board of Tax Appeals, which was affirmed by the said Circuit Court of Appeals for the Second Circuit, may be reversed and a mandate issued directing the redetermination of the amount of your petitioner's income taxes for the year 1931, as prayed for in your petitioner's petition to the said Board of Tax Appeals; and your petitioner prays for such other and further relief as to this Court shall seem just and proper; and your petitioner will ever pray.

Dated: New York, N. Y., October 8, 1936.

WILLIAM WHITLOCK BRUSH,
Petitioner.

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Supreme Court of the United States

No. . October Term, 1936.

WILLIAM WHITLOCK BRUSH,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The City of New York is, with the exception of a negligible area, supplied with water from a system owned and operated by the Bureau of Water Supply. Private enterprise demonstrated its inadequacy to the task as far back as the year 1833. See N. Y. Laws 1833, ch. 36; N. Y. Laws 1834, ch. 256.

Steadily developing over a period of 100 years, the municipal water supply system now represents an outlay of $480,000,000 (R. 23), and is the result of special statutory powers of eminent domain exercised in counties far beyond the city limits.† No profit flows from the system's operations, the loss for the year 1933 being $7,000,000 (R. 33).

Water is, of course, supplied to the City itself (*e. g.*, for fire hydrants, sewage disposal, street cleaning purposes and public buildings) as well as to private consumers, and the Bureau's expenses are apportioned between public service and private service in the ratio of 25.2% and 74.8% (R. 21). But petitioner's entire salary was adjudged taxable.*

* We may suggest to the Court that there are many employees of the Bureau who give their entire time to the *public* service functions of the Bureau, *e. g.*, those who operate the high pressure water system used only to extinguish fires.

† See footnote next page

In asserting that the petitioner had no right to exclude his salary as such engineer from his taxable income for the year 1931, the Government wrote him as follows (R. 9):

> "It is held that the supplying of water by water plants to the residents of a community constitutes the discharge of a proprietary function as distinguished from an *essential* governmental function, consequently the compensation of the officers and employees of such plants is subject to Federal Income Tax." (Italics ours.)

As an employee (chief engineer) of the Bureau of Water Supply, the body charged with the operation of the system, the petitioner has duties which the Court below described as follows (R. 44-45):

> "During 1931, the petitioner was regularly employed, as he had been previously for many years, by the city of New York as the engineer in charge of its Bureau of Water Supply. This was a statutory office for which he had duly qualified. He was paid a fixed salary and was charged in general with the responsibility for supervising the maintenance of an adequate supply of pure and wholesome water for the city of New York and its inhabitants. The water for public and private use in that city for the most part, though not wholly, comes from an enormous system owned by the city which has cost about half a billion dollars and which must be still further enlarged to meet the ever growing demands upon it. Petitioner's duties require him to make surveys, plans and reports relative to improvements and enlargements of the system as well as to maintain in good condition the reservoirs, mains and equipment already possessed."

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†This Court need not go beyond its own records for proof of this. See *New York City* v. *Pine*, 185 U. S. 93 (1902); *McGovern* v. *City of New York*, 229 U. S. 363 (1913); *New Jersey* v. *New York*, 283 U. S. 336 (1931).

We digress for a moment to point out that the salary of a taxpayer with practically identical duties was held exempt in *Halsey* v. *Helvering*, 75 F. (2d) 234 (U. S. Ct. of Appeals for the Dist. of Columbia, 1934). The Court's statement of the duties of the taxpayer (an engineer employed by two New Jersey towns) in the latter case illustrates the conflict between the two appellate Courts. They said (p. 235):

> "* * * the official duty of the taxpayer as township engineer was to advise the town government in all engineering matters, specifically including the construction, maintenance, and alteration of streets and ways, sewers, *waterworks*, and lighting systems; to prepare plans and specifications for such works; to advertise for bids; and to maintain custody of the plans, maps, and documents thereof, keeping them up to date by appropriate entries or new papers showing changes and alterations." (Italics ours.)

Opinion Below.

In delivering the opinion of the Circuit Court of Appeals, Judge CHASE, after summarizing the facts, and the arguments put forward by petitioner, and after acknowledging the magnitude of the undertaking, said (R. 46):

> "* * * but it is not equally clear that private enterprise adequately encouraged could not do it as well. To say that it could not in the light of common knowledge as to modern private achievement in business on a vast scale would seem to deny probability. In any event such an assertion is not adequately supported by evidence in this record."

He then went on to state that while water was indispensible to the inhabitants, the conduct of a municipal water supply

system is not "an activity necessary to its [the City's] existence as a government." He added (R. 47-48):

> "On the contrary, due regard must be had to distinguish between those activities which, though impressed with a public interest and sometimes, even often, performed by government are nevertheless done in a proprietary capacity in supplying to the public for a direct charge what it could, and otherwise would, procure from private sources and those services which have become the usual activities of government because purely governmental power is in some degree essential to their performance."

Questions Presented.

Upon the record as outlined above, the petitioner maintains that the following questions of law arise for the determination of this Court:

1. The supplying of water to Greater New York for use by the City itself and its inhabitants being an undertaking which cannot be either competently or safely left to private enterprise and having been conducted by the Government for over a century, should not the salary of a municipal employee serving as engineer to the Bureau of Water Supply be exempt from federal income taxes?

2. In order to receive immunity, must the activity of the municipality be "necessary to its existence as a government" (R. 47), or is it sufficient that the activity is "essential to the normal life of the community"? *Jamestown etc. Co.* v. *Commissioner,* 41 F. (2d) 920 (1st Circ., 1930), and other cases *post,* p. 15.

ARGUMENT.

1. The proper protection of municipalities from federal interference requires that "usual governmental function" be defined pragmatically. Excessive strictness of definition should be avoided. The supply of pure water to a metropolis is a "usual governmental function".

It will be recalled that in *Helvering* v. *Powers*, 293 U. S. 214, 225 (1934), the States were admonished that they could not

> "withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual* governmental functions and to which, by reason of their nature, the federal taxing power would normally extend." (Italics ours.)

The substitution of "*usual* governmental functions" for the formerly prevalent phrase "*essential* governmental functions" is one of the most noteworthy features of the *Powers* case.* Yet the Court below seems to have overlooked the change, and to have confined the privilege of city employees against the federal taxation of their salaries to employees engaged in functions the suspension of which would suspend government itself. Governments in the world today must carry on activities which are outside of the meaning of the verb "to govern". Governments cannot rest content with the issuance of commands and prohibitions. They must in modern societies *purvey services*. Of

* The origin of the earlier phrase is traceable to *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172 (1911). It was devised to accentuate a distinction between "those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character".

course we appreciate the wisdom of the rule in *South Carolina* v. *United States,* 199 U. S. 437 (1905), that States cannot withdraw unlimited areas from the field of federal taxation.

Now it is clear that it is "usual" for municipalities to operate their own waterworks. In the *Municipal Index and Atlas,* 1934-35 Edition, a list is given on pages 120-132 of political units (of 10,000 population) which are served by waterworks. Out of 969 separate waterworks 779 or 80.39% are municipally owned and operated, and only 190 or 19.61% are privately owned and operated. An examination of earlier editions of this reference work shows a steady rise in the percentage of municipally owned and operated waterworks. Unless we are to reject facts and wander along the by-paths of metaphysics and sophistry, the syllogism would seem complete, and the petitioner's right to tax exemption established.

To sanctify the dictum (for dictum it certainly was) in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 172 (1911), that it "is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like", and to regard the utterance as an immutable edict comparable to the laws of the Medes and the Persians, is to close one's eyes to the eternal processes of change and development that go on unceasingly in our political affairs. We know of no principle compelling a federal court to hold that, even if it be assumed that water supply was not generally regarded as a usual governmental function in 1911, that activity cannot become one by the gradual unfolding of civic history. On the contrary, in *Hoskins* v. *Commissioner of Internal Revenue,* 84 F. (2d) 627 (5th Circ., 1936), the Court took pains to point out that in considering whether a given activity (*i. e.,* running a

cafeteria in connection with a public school) was properly a governmental function and those engaged in it properly exempt from federal taxation, it should consider actualities and not be bound by views prevailing in times past.

Even before *Flint* v. *Stone Tracy Co., supra,* this Court had made pronouncement upon the subject of the duty of municipalities in reference to waterworks in *Columbus* v. *Mercantile Trust Co.,* 218 U. S. 645 (1910), saying (p. 658):

> "No higher police duty rests upon municipal authority than that of furnishing an ample supply of pure and wholesome water for public and domestic uses. The preservation of the health of the community is best obtained by the discharge of this duty, to say nothing of the preservation of property from fire, so constant an attendant upon crowded conditions of municipal life."

We submit that the legislature was both right and reasonable, in concluding in 1833 and in adhering to that view ever since, that supplying water to New York City was an act "which the State [or its political subdivisions] can only do for itself,"—the phrase used in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 172 (1911).

While the Court probably intended us to apply *a priori* tests to determine whether an activity might be so characterized, nevertheless we submit that the more obvious illustrations, which we cite in the margin,* may be supplemented by illustrations evolved from *a posteriori* or experiential tests as well. And we maintain that the case at bar presents a perfect *practical* instance of an activity "which the State can only do itself".

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* The Governor of a State (or the Mayor of a City), the members of the legislature, the judiciary and the law-enforcing agencies, are by virtue of their functions clearly within the group envisaged in the quoted phrases.

The population of Greater New York, as shown by the 1930 census, was 6,930,446. In developing its water supply system, the City has already spent $480,000,000 (R. 23). This, as the Court well knows, has involved condemning for reservoirs and other instrumentalities related to water supply purposes areas of ground many square miles in extent, and situated far beyond the city limits. It is more than questionable whether private capital could have been assembled in sufficient quantities to carry on the needed construction operations. And since, as an incident to these operations, it has been made the City's express duty (L. 1905, ch. 724, § 35, as amended by L. 1928, ch. 525, § 5) to build and maintain highways and bridges in the vicinity of the reservoirs, and to give police protection to neighboring localities during the period of construction (*ibid.*), additional reasons are revealed for not trusting to private capital to carry out the enterprise.

The wide geographical areas exploited in connection with the maintenance of a supply adequate to the City's expanding needs may be discerned by reference to the following cases:

New York City v. *Pine,* 185 U. S. 93 (1902), Byram River, Westchester County;

McGovern v. *City of New York,* 229 U. S. 363 (1913), lands in Ulster County;

New Jersey v. *New York,* 283 U. S. 336 (1931), headwaters of Delaware River, Delaware, Sullivan, Orange and Rockland Counties;

People ex rel. Burhans v. *City of New York,* 198 N. Y. 439 (1910), lands in Ulster County;

Matter of Board of Water Supply, 211 N. Y. 174 (1914), lands in Ulster County;

Matter of Van Etten v. *City of New York,* 226 N. Y. 483 (1919), Esopus Creek, Ulster County;

Matter of Gillespie, 272 N. Y. 18 (1936), Esopus Creek, Ulster County;

Matter of City of New York (Mohansic Lake), 234 App. Div. 890 (2nd Dept., 1931), lands in Yorktown, Westchester County.

It was, therefore, quite reasonable for the legislature to determine, in its wisdom, that the City should not have to trust to the dubious efficacy of private capital but should be empowered to do the acts and complete the enterprise itself.

While the quoted phrase, "which the State can only do itself", presupposes a fairly absolute standard of possibility or impossibility, yet a legislative determination that an act can only be done by the State should, like any other "declaration by a legislature concerning public conditions that by necessity and duty it must know," *Block* v. *Hirsh,* 256 U. S. 135, 154 (1921), be respected by the Courts, until shown to be mistaken by a more impressive array of evidence than can be found in the record in the instant case.

We therefore submit that the Court below erred in cavalierly disregarding the findings of the State legislature and in concluding—recklessly concluding, we are tempted to say—that to deny the adequacy of private enterprise to this stupendous task is "to deny probability" (R. 46). On the contrary, the Court's conclusion itself is in utter disregard not only of probability but of actuality, and of a century of civic history.

2. A conflict among the circuits is plainly discernible.

The Court below stated in its opinion (R. 49):

> "The petitioner's work in furtherance of the supply of water by the city of New York as above outlined and for which he has been paid the salary taxed is not, in the light of the foregoing considerations, part

> of what his employer has to do to perform its *necessary* functions as a political subdivision of the state of New York. So the salary of the petitioner was not part of the expense attendant upon the exercise of what may be said to be *usual* governmental powers, Helvering v. Powers supra, or in the doing of what the states have *traditionally* engaged."

The Second Circuit's holding in the instant case limiting immunity to what is "necessary" for the City to do to maintain its existence as a political subdivision of the State, and the further emphasis upon tradition, are in sharp conflict with *Hoskins* v. *Commissioner of Internal Revenue, ante*, p. 10, where the Fifth Circuit took pains to point out that in the light of present day conditions, the running of a cafeteria in connection with a public school was *"now"* a proper governmental activity, entailing as a result the exemption from federal taxation of the salary of the superintendent of the cafeteria. There is also manifest a sharp contrast with *Jamestown & Newport Ferry Co.* v. *Commissioner of Internal Revenue*, 41 F. (2d) 920 (1st Circ., 1930), holding that the income of a ferry company, of which the town of Jamestown, R. I., held a majority of the stock, was exempt from federal income taxes on the ground, among others, that the ferry was "essential to the normal life of this community" (p. 923), a markedly broader and more liberal test than that of necessity to existence as a political subdivision, adopted by the Court below.

The decision is also in conflict with *Halsey* v. *Helvering, ante* p. 7, a case where the salary of a township engineer with duties practically identical with those of the petitioner was held exempt by the United States Court of Appeals for the District of Columbia.

3. The rule of decision adopted by the Court below will create confusion as to the legal limits of the taxing power of the Federal Government and of the States.

The logic of the Second Circuit's decision limiting, as it does, immunity from taxation to functions "necessary" to existence as a governmental body must inevitably lead to the conclusion that the Federal Government can tax the total income received by a municipality from its supply of water, and income derived by the State or its subdivisions from canals, waterways, parks, etc.

The decision would seem to lead, correlatively, to a wide extension of the powers of the State to tax federal agencies, including among others, the Tennessee Valley Authority.

Conclusion.

We submit that the case merits the attention of this Court because the status for federal tax purposes of municipal water supply employees has not yet been passed upon by this Court; because the problem, raised by one type or another of public servant, has given rise to sharp conflicts among the Circuit Courts of Appeals; because it is but a short step from taxing this petitioner to taxing the municipal enterprise itself; because (in cities of over 10,000 population) there are 779 municipally owned waterworks in the country whose employees, numbered by the thousands, are affected by the decision below; and because federal interference with their relations impinges upon vital points in city government, *i. e.*, the provision of adequate protection against fire hazards, and of adequate means for sewage disposal and the cleaning of the streets.

The Petition for Certiorari Should be Granted.

October 8, 1936.

Respectfully submitted,

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